



**<RULE>**

**<PREAMB>**

**DEPARTMENT OF LABOR**

**Employment and Training Administration**

**20 CFR Part 655**

**RIN 1205-AB61**

**Wage Methodology for the Temporary Non-Agricultural Employment H-2B Program;  
Delay of Effective Date**

**AGENCY:** Employment and Training Administration

**ACTION:** Final rule; delay of effective date.

**SUMMARY:** The Department of Labor (Department) is delaying the effective date of the Wage Methodology for the Temporary Non-agricultural Employment H-2B Program (the Wage Rule) to October 1, 2012 in response to recently enacted legislation that prohibits any funds from being used to implement the Wage Rule for the remainder of fiscal year (FY) 2012. The Wage Rule revised the methodology by which we calculate the prevailing wages to be paid to H-2B workers and United States (U.S.) workers recruited in connection with a temporary labor certification for use in petitioning the Department of Homeland Security to employ a nonimmigrant worker in H-2B status.

**DATES:** The effective date of the rule amending 20 CFR part 655, published January 19, 2011, at 76 FR 3452, delayed at 76 FR 45667, August 1, 2011, and further delayed at 76 FR 59896, September 28, 2011, and 76 FR 73508, November 29, 2011, is delayed further until October 1, 2012.

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3010 (this is not a toll-free number). Individuals with hearing or speech impairments may access the telephone number above via TTY by calling the toll-free Federal Information Relay Service at 1-877-889-5627 (TTY/TDD).

#### **SUPPLEMENTARY INFORMATION:**

The Department of Labor (Department) published the Wage Methodology for the Temporary Non-agricultural Employment H-2B Program; Final Rule (the Wage Rule) on January 19, 2011, 76 FR 3452. The Wage Rule revised the methodology by which we calculate the prevailing wages to be paid to H-2B workers and United States (U.S.) workers recruited in connection with a temporary labor certification for use in petitioning the Department of Homeland Security to employ a nonimmigrant worker in H-2B status. The Department originally set the effective date of the Wage Rule for January 1, 2012. However, due to a court ruling that invalidated the January 1, 2012 effective date of the Wage Rule,<sup>1</sup> we issued a Notice of Proposed Rulemaking (NPRM) on June 28, 2011, which proposed that the Wage Rule take effect 60 days from the date of publication of a final rule resulting from the NPRM. 76 FR 37686, June 28, 2011. After a period of public comment, we published a Final Rule on August 1, 2011, which set the new effective date for the Wage Rule of September 30, 2011 (the Effective Date Rule).

Both the Wage Rule and the Effective Date Rule recently were challenged in two separate lawsuits<sup>2</sup> seeking to bar their implementation. In consideration of the two pending challenges to the Wage Rule and its new effective date, and the possibility that the litigation

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<sup>1</sup> CATA v. Solis, Civil Docket No. 09-240, Doc. No. 119, 2011 WL 2414555 (E.D. Pa. June 16, 2011).

<sup>2</sup> See Louisiana Forestry Association, Inc., et al. (LFA) v. Solis, et al., Civil Docket No. 11-1623 (W.D. La, Alexandria Division); and Bayou Lawn & Landscape Services, et al. (Bayou) v. Solis, et al., Civil Docket No. 11-445 (N.D. Fla., Pensacola Division).

would be transferred to another court,<sup>3</sup> the Department issued a final rule, 76 FR 59896, September 28, 2011, postponing the effective date of the Wage Rule from September 30, 2011, until November 30, 2011, in accordance with the Administrative Procedure Act, 5 U.S.C. 705.

On November 18, 2011, President Obama signed into law the Consolidated and Further Continuing Appropriations Act, 2012, which provides that “[n]one of the funds made available by this or any other Act for fiscal year 2012 may be used to implement, administer, or enforce, prior to January 1, 2012 the [Wage Rule].” Public Law No. 112-55, Div. B, Title V, § 546 (Nov. 18, 2011) (the November Appropriations Act). While the November Appropriations Act prevents the expenditure of funds to implement, administer, or enforce the Wage Rule before January 1, 2012, it did not prohibit the Wage Rule from going into effect, which was scheduled to occur on November 30, 2011. When the Wage Rule goes into effect, it will supersede and make null the prevailing wage provisions at 20 CFR 655.10(b) of the Department’s existing H-2B regulations, which were promulgated under Labor Certification Process and Enforcement for Temporary Employment in Occupations Other Than Agriculture or Registered Nursing in the United States (H-2B Workers), and Other Technical Changes; Final Rule, 73 FR 78020, Dec. 19, 2008 (the H-2B 2008 Rule). The Department determined that allowing the Wage Rule to go into effect as planned on November 30, 2011, would therefore render the Department unable to issue prevailing wage determinations under the 2008 H-2B Rule, because it would no longer exist. Accordingly,

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<sup>3</sup> On September 19, 2011, the plaintiffs in the CATA litigation moved to intervene in the LFA litigation, and also moved to transfer venue over the litigation to the Eastern District of Pennsylvania, the court in which the CATA case remains pending. The plaintiffs’ motion to intervene was granted by the U.S. District Court in the Western District of Louisiana on Sept. 22, 2011, but was denied by the U.S. District Court in the Northern District of Florida on Nov. 23, 2011. Additionally, the motion to transfer venue was granted by the U.S. District Court in the Western District of Louisiana on Dec. 12, 2011 but was denied by the U.S. District Court in the Northern District of Florida on Dec. 12, 2011.

the Department issued a final rule, 76 FR 73508, on November 29, 2011 which delayed the effective date of the Wage Rule until January 1, 2012.

On December 23, 2011, President Obama signed into law the Consolidated Appropriations Act, 2012, which provides that “[n]one of the amounts made available under this Act may be used to implement the [Wage Rule].” Similar to the November Appropriations Act, the December Appropriations Act prevents the expenditure of funds to implement the Wage Rule for the remainder of FY 2012, but it does not prohibit the Wage Rule from going into effect. If the Wage Rule were to go into “effect” on January 1, 2012, we would be unable to issue prevailing wage determinations under the 2008 H-2B rule and the H-2B program would be have to be held in abeyance for the remainder of FY 2012, as we would be legally precluded from issuing prevailing wage determinations for the remainder of FY 2012. Because of the imminent threat that we will be unable to operate the H-2B program for the remainder of FY 2012, the Department considers this situation an emergency warranting the publication of a final rule under the good cause exception of the Administrative Procedure Act. See 5 U.S.C. 553(b)(B) and 553(d)(3).

In order to avoid an operational hiatus during the remainder of FY 2012, the Department finds good cause to adopt this rule, effective immediately, and without prior notice and comment. See 5 U.S.C. 553(b)(B) and 553(d)(3). As such, a delay in promulgating this rule past the date of publication would be impracticable and unnecessary and disrupt the program to the detriment of the public interest.

Signed at Washington, D.C. this 23rd of December, 2011.

Jane Oates

Assistant Secretary for Employment and Training

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